

Kazerouni Law Group, APC

Abbas Kazerounian, Esq. (SBN: 249203)

ak@kazlg.com

2700 North Main Street, Ste. 1000

Santa Ana, CA 92866

Telephone: (800) 400-6808

Facsimile: (800) 520-5523

Hyde & Swigart

Joshua B. Swigart, Esq. (SBN: 225557)

josh@westcoastlitigation.com

411 Camino Del Rio South, Suite 301

San Diego, CA 92108-3551

Telephone: (619) 233-7770

Facsimile: (619) 297-1022

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TAMAR ESTANBOULIAN,
Individually And On Behalf Of
All Others Similarly Situated,**

Plaintiff,

v.

**TOYS ‘R’ US-DELAWARE,
INC.,**

Defendant.

Case No.: '13CV0586 JAH BLM

CLASS ACTION

**Complaint for Damages and
Injunctive Relief Pursuant To The
Telephone Consumer Protection
Act, 47 U.S.C § 227 et seq.**

Jury Trial Demanded

INTRODUCTION

1. TAMAR ESTANBOULIAN (“Plaintiff”) brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of TOYS ‘R’ US-

1 DELAWARE, INC. (“TOYS R US” or “Defendant”) in negligently and/or
2 intentionally contacting Plaintiff on Plaintiff’s cellular telephone, in
3 violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et
4 seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as
5 follows upon personal knowledge as to himself and his own acts and
6 experiences, and, as to all other matters, upon information and belief,
7 including investigation conducted by his attorneys.

8 2. The TCPA was designed to prevent calls like the ones described within this
9 complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous
10 consumer complaints about abuses of telephone technology – for example,
11 computerized calls dispatched to private homes – prompted Congress to pass
12 the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

13 3. In enacting the TCPA, Congress intended to give consumers a choice as to
14 how creditors and telemarketers may call them, and made specific findings
15 that “[t]echnologies that might allow consumers to avoid receiving such
16 calls are not universally available, are costly, are unlikely to be enforced, or
17 place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, §
18 11.

19 4. Toward this end, Congress found that:

20 [b]anning such automated or prerecorded telephone calls
21 to the home, except when the receiving party consents to
22 receiving the call or when such calls are necessary in an
23 emergency situation affecting the health and safety of the
24 consumer, is the only effective means of protecting
25 telephone consumers from this nuisance and privacy
invasion.

26 *Id.* at § 12; *see also, Martin v. Leading Edge Recovery Solutions, LLC*, 2012
27 WL 3292838, at *4 (N.D. Ill. Aug. 10, 2012) (citing Congressional findings
28 on TCPA’s purpose).

5. Congress also specifically found that “the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call...” *Id.* at §§ 12-13. *See also, Mims*, 132 S. Ct. at 744.

6. As Judge Easterbrook of the Seventh Circuit recently explained in a TCPA case regarding calls to a non-debtor similar to this one:

The Telephone Consumer Protection Act ... is well known for its provisions limiting junk-fax transmissions. A less-litigated part of the Act curtails the use of automated dialers and prerecorded messages to cell phones, whose subscribers often are billed by the minute as soon as the call is answered—and routing a call to voicemail counts as answering the call. An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.

Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 638 (7th Cir. 2012).

7. The Ninth Circuit recently affirmed certification of a TCPA class action remarkably similar to this one in *Meyer v. Portfolio Recovery Associates, LLC*, __ F.3d __, 2012 WL 4840814 (9th Cir. Oct. 12, 2012).

JURISDICTION AND VENUE

8. This Court has federal question jurisdiction because this case arises out of violation of federal law. 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).

9. Venue is proper in the United States District Court for the Southern District of California pursuant to 18 U.S.C. § 1391(b) because Plaintiff resides in the State of California, and Defendant is subject to personal jurisdiction in the State of California and the County of San Diego because it conducts business there.

///

PARTIES

10. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (10).

11. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and at all times mentioned herein was, a corporation whose primary corporate address is in the State of New Jersey, and is incorporated in the State of Delaware. Defendant, is and at all times mentioned herein was, a corporation and is a “person,” as defined by 47 U.S.C. § 153 (10). Defendant is a national retailer of consumer products. Plaintiff alleges that at all times relevant herein Defendant conducted business in the State of California and in the County of San Diego, and within this judicial district.

FACTUAL ALLEGATIONS

12. At all times relevant, Plaintiff was a citizen of the State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (10).

13. Defendant is, and at all times mentioned herein was, a corporation and a “person,” as defined by 47 U.S.C. § 153 (10).

14. At all times relevant Defendant conducted business in the State of California and in the County of San Diego, and within this judicial district.

15. At no time did Plaintiff provide Plaintiff’s cellular telephone number to Defendant.

16. On or about February 23, 2013, at approximately 11:06 a.m. (PST), TOYS R US contacted Plaintiff’s cellular telephone by sending Plaintiff an unsolicited SPAM text message.

///

///

///

1 17. This unsolicited SPAM text message reads:

2 Toys “R” Us: Big brands, BIGGER savings! Save \$20 on
3 LEGO, Plus deals on Skylanders, Barbie, NERF & more!
4 All deals & details: <http://j.toysrus.com/022413>

5 18. Through this unsolicited SPAM text message, TOYS R US solicited
6 Plaintiff’s business and/or marketing products to Plaintiff.

7 19. This unsolicited SPAM text message was sent to Plaintiff’s cellular
8 telephone by Defendant using short message script (“SMS”) “786-97,”
9 which is the SMS assigned to TOYS R US.

10 20. When a consumer clicks on the web link <http://j.toysrus.com/022413>, the
11 consumer is directed to a webpage for TOYS R US, where Defendant
12 advertises its products, and among other things, indicates that consumers can
13 “SAVE \$20” “on your regular-priced LEGO construction purchase of \$75 or
14 more,” and states that the discount applies to “in-store” purchases only.

15 21. This unsolicited SPAM text message placed to Plaintiff’s cellular telephone
16 was placed via an “automatic telephone dialing system,” (“ATDS”) as
17 defined by 47 U.S.C. § 227 (a)(1), as prohibited by 47 U.S.C. § 227
18 (b)(1)(A), using SMS 786-97.

19 22. This ATDS has the capacity to store or produce telephone numbers to be
20 called, using a random or sequential number generator.

21 23. The telephone number that Defendant, or its agent called was assigned to a
22 cellular telephone service for which Plaintiff incurs a charge for incoming
23 calls pursuant to 47 U.S.C. § 227 (b)(1).

24 24. This unsolicited SPAM text message constituted a call that was not for
25 emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

26 25. Plaintiff did not provide Defendant or its agent prior express consent to send
27 the unsolicited SPAM text message, pursuant to 47 U.S.C. § 227 (b)(1)(A),
28 which was sent to Plaintiff by Defendant or Defendant’s agent.

26. This unsolicited SPAM confirmatory text message was sent by Defendant, or its agent, in violation of 47 U.S.C. § 227(b)(1).

CLASS ACTION ALLEGATIONS

27. Plaintiff brings this action on behalf of himself and on behalf of all others similarly situated (“the Class”).

28. Plaintiff represents, and is a member of the Class, consisting of: “all persons within the United States who received a text message from Defendant without prior express consent, which message by Defendant or its agent was not made for emergency purposes, within the four years prior to the filing of this Complaint.”

29. Defendant and its employees or agents are excluded from the Class. Plaintiff does not know the number of members in the Class, but believes the Class members number in the tens of thousands, if not more. Thus, this matter should be certified as a Class action to assist in the expeditious litigation of this matter.

30. Plaintiff and members of the Class were harmed by the acts of Defendant in at least the following ways: Defendant, either directly or through its agents, illegally contacted Plaintiff and the Class members via their cellular telephones by an unsolicited SPAM text message, thereby causing Plaintiff and the Class members to incur certain cellular telephone charges or reduce cellular telephone time for which Plaintiff and the Class members previously paid, and invading the privacy of said Plaintiff and the Class members. Plaintiff and the Class members were damaged thereby.

31. This suit seeks only damages and injunctive relief for recovery of economic injury on behalf of the Class, and it expressly is not intended to request any recovery for personal injury and claims related thereto. Plaintiff reserves the right to modify or expand the Class definition to seek recovery on behalf of additional persons as warranted as facts are learned in further investigation

1 and discovery.

2 32. The joinder of the Class members is impractical and the disposition of their
3 claims in the Class action will provide substantial benefits both to the parties
4 and to the court. The Class can be identified through Defendant's records or
5 Defendant's agents' records.

6 33. There is a well-defined community of interest in the questions of law and
7 fact involved affecting the parties to be represented. The questions of law
8 and fact to the Class predominate over questions that may affect individual
9 Class members, including, but not limited to, the following:

- 10 1. Whether, within the four years prior to the filing of this Complaint,
11 Defendant or its agents sent any unsolicited text message/s to the
12 Class (other than a message made for emergency purposes or made
13 with the prior express consent of the called party) to a Class member
14 using any automatic dialing and/or SMS texting system to any
15 telephone number assigned to a cellular phone service;
 - 16 2. Whether Plaintiff and the Class members were damaged thereby, and
17 the extent of damages for such violation; and
 - 18 3. Whether Defendant and its agents should be enjoined from engaging
19 in such conduct in the future.
- 20 34. As a person who received at least one unsolicited SPAM text message
21 without Plaintiff's prior express consent, Plaintiff is asserting claims that are
22 typical of the Class. Plaintiff will fairly and adequately represent and protect
23 the interests of the Class in that Plaintiff has no interests antagonistic to any
24 member of the Class.
- 25 35. Plaintiff and the members of the Class have all suffered irreparable harm as
26 a result of the Defendant's unlawful and wrongful conduct. Absent a class
27 action, the Class will continue to face the potential for irreparable harm. In
28 addition, these violations of law will be allowed to proceed without remedy

1 and Defendant will likely continue such illegal conduct. Because of the size
2 of the individual Class member's claims, few, if any, Class members could
3 afford to seek legal redress for the wrongs complained of herein.

4 36. Plaintiff has retained counsel experienced in handling class action claims
5 and claims involving violations of the Telephone Consumer Protection Act.

6 37. A class action is a superior method for the fair and efficient adjudication of
7 this controversy. Class-wide damages are essential to induce Defendant to
8 comply with federal and California law. The interest of Class members in
9 individually controlling the prosecution of separate claims against Defendant
10 is small because the maximum statutory damages in an individual action for
11 violation of privacy are minimal. Management of these claims is likely to
12 present significantly fewer difficulties than those presented in many class
13 claims.

14 38. Defendant has acted on grounds generally applicable to the Class, thereby
15 making appropriate final injunctive relief and corresponding declaratory
16 relief with respect to the Class as a whole.

17 **FIRST CAUSE OF ACTION**

18 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**

19 **47 U.S.C. § 227 ET SEQ.**

20 39. Plaintiff incorporates by reference all of the above paragraphs of this
21 Complaint as though fully stated herein.

22 40. The foregoing acts and omissions of Defendant constitute numerous and
23 multiple negligent violations of the TCPA, including but not limited to each
24 and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

25 41. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq.,
26 Plaintiff and The Class are entitled to an award of \$500.00 in statutory
27 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
28

42. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

SECOND CAUSE OF ACTION

KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT 47 U.S.C. § 227 ET SEQ.

43. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

44. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

45. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 et seq., Plaintiff and The Class are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

46. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

47. **WHEREFORE**, Plaintiff respectfully requests the Court grant Plaintiff and the Class members the following relief against Defendant:

FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF THE TCPA, 47 U.S.C. § 227 ET SEQ.

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

///

- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATIONS OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

TRIAL BY JURY

48. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: March 11, 2013

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: /s/ Abbas Kazerounian, Esq.
ABBAS KAZEROUNIAN
ATTORNEY FOR PLAINTIFF